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“REFLECTIONS ON THE SPECIAL ROLE
OF ATTORNEYS AS CONSUMER ADVOCATES
IN REGULATORY PROCEEDINGS”

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I want to begin by offering my personal welcome to everyone, especially those who traveled here from out of state. Welcome to San Francisco, the “City by the Bay.” We are delighted to host this year’s annual meeting of the NCRA.

Please also allow me the opportunity to thank my colleagues at the California Public Utilities Commission who worked so hard to pull this conference together. Personnel from both the Legal Division and the Administrative Law Judge Division of the CPUC have worked for months to make this day possible. I won’t attempt to identify by name

all of those who helped, but I would ask that you join me in a round of applause to show our gratitude to these hardworking volunteers.

I want to talk today about the special role of attorneys as consumer advocates in regulatory proceedings. Although my remarks are focused on attorneys who practice before state public utilities commissions, I think they also would be pertinent to practitioners before federal regulatory agencies such as the Federal Energy Regulatory Commission – my former employer some 25 years ago.

I also want to emphasize that these remarks represent my own thoughts and opinions. These are not the thoughts or opinions of the California Public Utilities Commission or of any other government agency here in the State of California. I think it's important to get this disclaimer out on the table at the outset.

When I speak today about attorneys as consumer advocates, I have in mind a particular type of organizational structure, which although common among the fifty-one jurisdictions in the United States may not

be universal. In particular, I am speaking about attorneys who are “embedded,” if you will indulge my use of this word, within the public utilities commission or within a ratepayer advocacy body housed outside the public utilities commission. In other words, I am talking about in-house lawyers employed by the commission or by the ratepayer advocacy organization.

Another important detail I am assuming for purposes of my remarks is that the ratepayer organization itself, whether housed within the PUC or elsewhere, has its own management and staff. The ratepayer advocacy organization in my remarks is the *client*, and is in a client-attorney relationship with the in-house attorney of whom I speak.

I realize that in some jurisdictions, the State Attorney General or another attorney serves in the role of consumer advocate, without any non-attorney client. This model is not used in California, nor to my knowledge in most states, but it is certainly a valid approach to the function of consumer advocacy before regulatory bodies. In my days at the Federal Energy Regulatory Commission, for example, the advocacy

staff, referred to as “Trial Staff,” were housed within the Office of the General Counsel. Under that model, there is no distinct “client” organization for the lawyers who perform the advocacy work. This model is more akin to a prosecutor’s office, where the lawyers themselves make all the important decisions – whether to seek an indictment, what charges to bring, whether to engage in plea bargain negotiations, what punishment to seek, etc.

There are pluses and minuses to either of these two models, and I have no intention today to delve into that topic. My only point in mentioning the two models is simply to clarify that my remarks today are focused on the first of these two models, in which the attorneys work on behalf of an identified consumer advocacy organization as their *client*.

I also think it bears emphasis that lawyers are special. I mean this sincerely. In civil society, lawyers are the first bastion in the defense of freedom, human rights and civil rights.

My mother was born in Ireland in December 1923, to a Roman Catholic family in Donegal, exactly one year after the Irish achieved independence from Great Britain. My grandparents and my mother's older siblings remembered very clearly the old days of British rule. During those times, Roman Catholics in Ireland were categorically prohibited from becoming lawyers. I will never forget the proud spark in my grandmother's eye when she learned I had passed the bar and become a lawyer. "In America, Frankie," she told me, in her thick Donegal brogue, "the best horse jumps the ditch."

So, yes, lawyers are different. We live by a code of ethics. We are part of an ancient, proud and independent profession.

In the American Bar Association's Model Rules of Professional Conduct, the first of the "general principles" governing the client-lawyer relationship is this: "Loyalty and independent judgment are essential elements in the lawyer's relationship with the client." (ABA Model Rules of Professional Conduct, Comment on Rule 1.7, "Conflicts of Interest – Current Client.")

Today I want to discuss how these foundational principles – loyalty and independent judgment – can and should serve as a guide to how we conduct ourselves as attorneys on behalf of consumer advocacy organizations.

Let me pose a hypothetical, to illustrate the kinds of difficulties real lawyers sometimes face in real cases in this arena of consumer advocacy before regulatory commissions. Then let me explain how I think the lawyer needs to respond under the canons of ethics.

So, here is my hypothetical:

I am employed as an attorney at the public utilities commission in my home state. I am a member in good standing of the state bar. I regularly appear before the commission as an advocate on behalf of a statutorily-created ratepayer advocacy organization. (For purposes of my hypothetical, it is unimportant whether the ratepayer advocacy organization is housed within the

public utilities commission or in a separate department of state government.)

I am assigned to a case in which the commission is considering the adoption of a “feed-in tariff” for a particular, innovative type of small electricity generator, namely, a fuel cell. According to Wikipedia, a fuel cell is “a device that converts the chemical energy from a fuel into electricity through a chemical reaction with oxygen or another oxidizing agent.”

(http://en.wikipedia.org/wiki/Fuel_cell#cite_note-1)

In my hypothetical, the state commission has received a declaratory order from the FERC, confirming that under the terms of a federal statute (the Public Utilities Regulatory Policies Act of 1978, or “PURPA,” 16 U.S.C. §§ 2601, *et seq.*) the state commission is authorized to set the rates and terms and conditions of service for sales of power from qualifying fuel cells at distribution voltage to interconnected investor-owned public utilities in the state. Under the terms of the statute as interpreted

by the FERC, the utility then will be obligated to purchase 100% of the fuel cell's output, at a rate fixed by the state public utilities commission. For purposes of this hypothetical, FERC has further declared that the state commission also has jurisdiction to set the terms for the physical interconnection of the fuel cell facilities to points of interconnection on the lower-voltage distribution circuits operated by investor-owned public utilities in the state.

This is complicated, but please stay with me.

The state commission now has launched a rulemaking in which it proposes to set the rate for sales of electricity from these qualifying fuel cells to the utility companies. The due date now is approaching for parties to submit their proposals in the form of written comments in the rulemaking docket.

The head of the ratepayer advocacy organization is a recent graduate of a master's degree program in public policy at a leading state university in the state where I work. I'll call this person Stella Artois.

After extensive internal discussion among staff of the ratepayer advocacy organization, along with me and my colleagues in the legal department, the issues come into focus. Stella wants to advocate that the state commission fix the rate for sales by the fuel cells at fifteen cents per kilowatt hour. In our state, for purposes of this hypothetical, let's assume the going rate for electricity sold by an efficient, state-of-the art power plant is five cents per kilowatt hour. Thus, the rate Stella wants to propose is three times higher than the rate for power from this more traditional type of power plant.

Stella's rationale for the high rate of 15-cents per kilowatt hour is that she thinks fuel cells ultimately will yield enormous benefits for ratepayers. It is a clean, pollution-free source of energy, and if delivered into the utility systems on their distribution circuits could avoid billions of dollars in high-voltage transmission lines needed to get power from the traditional large, baseload power plants. Stella also believes strongly that the

environmental benefits in terms of reduced greenhouse gas make it worthwhile to pay extra for this new “clean” source of electricity.

As the lawyer on the case, I feel very strongly that Stella’s fifteen-cent proposal is excessively high, and will constitute a windfall for fuel cell manufacturers and installers, at the expense of the general body of ratepayers. I have conferred with a staff economist who says the most we need to pay the fuel cell owners is ten cents per kilowatt hour, and at that rate we can expect to see huge success in this program. The economist convinces me that every penny above ten cents is a waste.

Stella, however, holds fast to her view that the ratepayer advocacy organization should propose a fifteen-cent rate in the rulemaking proceeding. The due date for written comments on this point is next week. Stella directs me to prepare the document, and to include a proposal for a fifteen-cent rate, along with the rationale she has articulated for why this is the correct rate.

So, let me pose the question: What is my responsibility as a lawyer at this juncture?

Before turning to what I think is the correct answer to this hypothetical, and the reasoning behind my proposed answer, please let me put aside some more hairy facts that might have complicated our hypothetical. In my hypothetical, I am aware of absolutely no evidence of any impropriety on Stella's part.

Although I disagree strongly with her recommendation, I have no reason to think she's been trolling for future employment prospects with the fuel cell companies, or accepting gifts or bribes of any kind from them. If my hypothetical involved such improprieties, then my obligations as a lawyer would be radically different. I might be obligated to engage in a "noisy withdrawal," by refusing to participate, and by bringing the improprieties to the attention of the appropriate authorities, perhaps the commission's management or the state attorney general's office.

Again, however, my hypothetical involves no improprieties at all, just a strongly held policy disagreement between me and the director of the ratepayer advocacy organization.

So, let me pose the question a second time: What is my responsibility as a lawyer at this juncture?

Here is how I would answer this question, drawing from my knowledge of – and commitment to – the canons of ethics applicable to attorneys.

First, I must be guided by the overarching duty of loyalty to my client, tempered of course by my obligation of independent judgment.

Second, I must engage in zealous advocacy on behalf of my client. Rule 3.3 of the ABA’s Model Rules imposes on me “an obligation to present the client’s case with persuasive force.” (Paragraph [1], Comment on ABA Model Rule 3.3.) The comment continues: “Performance of that duty, while maintaining confidences of the client,

however, is qualified by the advocate's duty of candor to the tribunal."

(Id.)

Third, as the quote I just read stresses, at all times I am strictly obligated to maintain the confidence of my client. Betrayal of my client's confidence – for example, by leaking a copy of an earlier email authored by Stella that expressed some doubts about the 15-cent rate she now supports – would be a serious breach of my ethical duty.

Let's return to the first of these guiding principles – loyalty to my client. I think we all know what loyalty looks like. Loyalty does not mean I am blind to my client's weaknesses. Loyalty does not mean sacrificing my independent judgment in terms of how I advise my client – on the contrary, independent judgment is also a part of my ethical duty under the canons of ethics. But loyalty absolutely does mean that I should stand by my client, through thick and thin, even when my client takes a position with which I disagree, as long as the client's position reasonably can be advocated under the law.

Now, please let me change my hypothetical with one tweak.

Suppose the state statute establishing the fuel cell program contained a sentence reading: “In no case shall the public utilities commission set a rate for such sales in excess of ten cents per kilowatt hour.” In that case, I would have no obligation to prepare or file written comments for the ratepayer advocacy organization proposing a fifteen-cent rate.

Under this revised set of facts, where the statute prohibits a rate in excess of ten cents, my duty would be different. As the comment on the ABA Model Rules states, “Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.”

Thus, if I, as the lawyer in my expanded hypothetical, were to file comments in support of a 15-cent rate, without acknowledging the statutory language prohibiting a rate greater than 10 cents, I would be engaging in conduct that fairly could be characterized as dishonesty toward the tribunal.

But if I remove this tweak from my hypothetical, and return to my original hypothetical, where the statute left open-ended the amount of the rate, I think it's clear that my duty is to file the comments Stella asked me to file.

But what if I am so strongly opposed to the fifteen-cent rate proposal that in good conscience I feel cannot sign onto the advocacy's staff's written comments making that proposal?

My solution in this circumstance would be to ask for a reassignment, but also to take steps to make sure I am not leaving my client in the lurch by withdrawing at the last minute. In the end, it all comes back to loyalty. Under the canons of ethics, I simply cannot be disloyal to my client, even in the circumstance where I disagree strongly with my client's wishes.

For a lawyer, the highest duty is loyalty and independent judgment, coupled with zealous and honest advocacy, and an absolute commitment to maintaining the client's confidence. As a lawyer, if you stick with

these core principles, you will be living up to the high standards of our profession, and you will make your grandmother proud.

Thank you.